accordance with the law and articles of association. The relevant principle of law cannot be stated with any greater precision than the judgment of Lord Davey in *Burland* v. *Earle*: [6]

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* and *Mozley* v. *Alston* . . . .".

There are exceptions to the rule which I do not think it necessary to cite. The rule is pre-eminently procedural in character and that was clearly expressed in a re-statement of the rule by Jenkins L.J. in *Edwards* v. *Haliwell*.[7] It is manifest, therefore, that the reasoning on which the rule is founded is that in all these cases it is for the company to complain by suing the alleged wrong-doer; the company is thus the proper plaintiff and the company is the majority. It is also manifest that the rule is only referable to domestic activities or internal managements of companies.

Counsel for the plaintiff cited two authorities, *Candler* v. *Crane, Christmas & Co.*[8] and *Hedley Byrne & Co.* v. *Heller & Partners*.[9] With regard to the first case I shall content myself with saying that in my opinion *Candler's* case (which was a majority decision of the Court of Appeal) may be regarded as an outstanding example of the principle that where there is no contractual duty there is no liability for negligence if the damage complained of is not physical. It is noteworthy also for the fact that there is a dissenting judgment by Denning L.J. (*ibid* at p. 17) which has attracted considerable attention. The effect of the majority decision of the Court of Appeal is, I think, that accountants and auditors owe no duty of care to anyone but their clients. Denning L.J. in his dissenting judgment said he thought that the law would fail to serve the best interests of the community if it should hold that accountants and auditors owed a duty to no one but their clients. So much for that case. *Hedley's* case is concerned with the proposition that wherever there is a relationship equivalent to contract there is a duty of care, and the relationship may be either of a general character, for example, the relationship of solicitor and client or of banker and customer, or of a particular character created *ad hoc*. The speech of Lord Devlin contains excerpts which I think are far-sighted. He remarked that the relationship may well go beyond contract, and I quote:

"There may well be others yet to be established . . . . Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed."

No doubt that speech is in line with the observation of Denning L.J. in his dissenting judgment in *Candler's* case.

In my judgment the above cases recite the proposition that wherever a relationship in contract exists between the parties, the duty of care arises. The standard of care required of an accountant and auditor is well illustrated in *Re London & General Bank (No. 2)*,[10] in *Re Kingston Cotton Mill Co. (No. 2)*,[11] in *Re City Equitable Fire Insurance Co. Ltd.*[12] The duties of a secretary are mainly statutory and some of these are conveniently summarised in *Palmer's* "Company Law" 20th edn. at p. 590. The plaintiffs by their claim are relying on the proposition of law as stated in *Candler* v. *Crane, Christmas & Co., supra*, as extended by *Hedley's* case. I am not concerned at this stage with the merits of the case. That have to be gone into in the light of the evidence properly adduced at the trial and to deal with that aspect of the case summarily would be to usurp the province of the trial judge. I am only concerned with the problem that the claim disclosed some cause of action and that the plaintiffs are the proper plaintiffs. In my view the answers are in the affirmative. The rule in *Foss* v. *Harbottle, supra*, cannot be accommodated in the present case because the facts as alleged in the pleadings do not cover "domestic proceedings" of a company. The present case is not a plain and obvious case to strike out the pleadings as disclosing no reasonable cause of action. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Morris Edgar & Co.; Shearn, Delamore & Co.*

COMPTROLLER OF INCOME TAX v. A.B. ESTATES LTD.

[F.C. (Barakbah L.P. Ismail Khan and MacIntyre JJ.) September 5, 1966]

[Ipoh — Federal Court Civil Appeal No. X13 of 1966]

Income Tax — Artificial transaction — Whether lease of rubber estate at uneconomic rental an artificial transaction — Income Tax Ordinance, 1947, s. 29.

This was an appeal against the decision of a judge of the High Court ([1966] 1 M.L.J. 260) allowing an appeal by the respondent from a decision of the board of review. The respondents were a limited liability company and had acquired a rubber estate, which they let to a subsidiary company of theirs, at the rental of $1,200 per annum. It was common ground that at the time of the lease the average net profit earned by the rubber estate was about $16,000 per annum. The comptroller held that the lease of the rubber estate to the subsidiary company at the rental of $1,200 per annum was an artificial transaction within the meaning of section 29 of the Income Tax Ordinance and included the nett income of the rubber estate in the assessable income of the respondents. On appeal the board of review upheld

the decision of the comptroller but on appeal by the respondents to the High Court the appeal was allowed. The comptroller appealed to the Federal Court. On behalf of the respondents it was argued, firstly that a taxpayer is entitled so to arrange his affairs so as to attract the least amount of tax possible; secondly that when such an arrangement is effected by a legally enforceable instrument, the court ought not to go behind the language of the instrument and look at the substance of the matter in order to interpret its meaning and effect; and thirdly that it is lawful for a "tax loss" company to acquire a solvent company, strip it off its profits, then dispose of the shares of the company at the market price and use the profits thus obtained to absorb the tax loss.

Held: (1) while a tax-payer is entitled to seek avenues of escape from payment of tax by disposing of part of his income for a lawful purpose, the facts in this case showed that the amount of income forgone under the lease was to be held by the subsidiary company for the sole use and benefit of the tax-payers themselves;

(2) there was no dispute as to the validity of the lease in this case or whether it was enforceable or not; the issue was whether the transaction was artificial within the meaning of section 29 of the Income Tax Ordinance;

(3) the lease of the rubber estate in this case was not a transaction in the ordinary course of business and therefore the transaction was artificial within the meaning of section 29 of the Income Tax Ordinance.

Cases referred to:—

(1) *Inland Revenue Commissioners* v. *Westminister* [1935] All E.R. Rep. 259.

(2) *Russel* v. *Inland Revenue Commissioners* [1944] 2 All E.R. 192.

(3) *Inland Revenue Commissioners* v. *Wesleyan Assurance Society* [1946] 2 All E.R. 749, 751.

(4) *Griffiths* v. *Harrison* [1962] 1 All E.R. 909.

(5) *Newton* v. *Commissioner of Taxation* [1958] A.C. 450.

(6) *Petrotim Securities Ltd.* v. *Ayres* [1964] 1 All E.R. 269 at p. 272.

(7) *Ridges Securities Ltd.* v. *Inland Revenue Commissioner* [1964] 1 All E.R. 275 at p. 285.

FEDERAL COURT.

Au Ah Wah (Federal Counsel) for the appellant.

N. T. Rajah for the respondents.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal by the Comptroller of Income Tax from the decision of a judge of the High Court, Perak, in Civil Appeal No. 14 of 1965 ([1966] 1 M.L.J. 260) allowing an appeal by the respondents from the decision of the Board of Review.

The respondents are a limited liability company incorporated in 1955 by the name of "A.B. Estates Ltd.". The respondents own, manage and operate the A.B. Estates which is situate near the town of Parit, in the State of Perak. Adjoining this estate lies the S.R. Estate (hereinafter referred to as "S.R.") which was acquired by the respondents in December 1961. However, before the purchase of S.R., the directors of the respondents with the object of accumulating capital to embark upon a replanting scheme, had decided on a plan of action whereby it was hoped that payment of income tax on the assessable income of S.R. could be avoided.

Early in 1961, a company by the name of K.P.M. Ltd. (hereinafter referred to as "K.P.M.") had closed down business owing to the failure of their mining enterprise. The company incurred financial loss and this was known to one of the directors of the respondents, who also sat on the board of directors of K.P.M. but held no shares. In July 1961 the secretaries of the respondents wrote to the Comptroller of Income Tax enquiring what would be the amount of loss sustained by K.P.M. which would be available to carry forward to 1962 for the purpose of a set-off against income tax on the assessable income under section 33(2)(a) and (b) of the Income Tax Ordinance (hereinafter referred to as the "Ordinance"). The comptroller replied by a letter dated the 24th of August (*vide* Exh. D) informing, that according to his computation, the amount was $124,424. Sometime after the receipt of this letter the respondents bought up all the shares in K.P.M. for and at a price of $89,733; but as against this payment they took over the assets of K.P.M., mostly in cash amounting to $88,500. Apparently, K.P.M. had no outstanding liabilities and the financial loss sustained had presumably been written off at the expense of the former shareholders.

On the 29th of December 1961, the respondents purchased S.R. and on the 1st day of January 1962 leased it to K.P.M. for a period of 5 years at an annual rental of $1,200. It is common ground that at the time of the lease the average net profit earned by S.R. then was about $16,000 per annum. By leasing out S.R. to K.P.M. the respondents hoped to reap two fiscal benefits, namely:

(i) The reduction of the assessable income of S.R. from $16,000 to $1,200 as far as the respondents were concerned; and

(ii) The avoidance of tax in respect of the profits earned by K.P.M. from S.R. by set-off of past losses against tax on the assessable income by virtue of section 33(2)(a) and (b) of the Ordinance.

However, the comptroller holding that the lease of S.R. to K.P.M. at a rental of $1,200 per annum was an artificial transaction within the meaning of section 29 of the Ordinance disregarded the lease and included the net income of S.R. in the assessable income of the respondents. Notice of additional assessment under section 69(1) was duly served on the respondents. An objection by the respondents lodged under section 72(2) was rejected by the comptroller. On appeal the Board of Review upheld the decision of the comptroller but on an appeal by the respondents to the High Court the appeal was

allowed. It is from that decision the comptroller now appeals.

On behalf of the respondents it was urged upon us, firstly, that a taxpayer is entitled to so arrange his affairs as to attract the least amount of tax possible; secondly, that when such an arrangement is effected by a legally enforceable instrument, the court ought not to go behind the language of the instrument and look at the 'substance' of the matter in order to interpret its meaning and its effect; and thirdly, that it is lawful for a 'tax loss' company to acquire a solvent company, strip it of its profits, then dispose of the shares of the company at the market price and use the profits thus obtained to absorb the tax loss.

With regard to the first point, we were referred to the judgments of the House of Lords in *Inland Revenue Commissioners* v. *Westminister* [1] and particularly to a passage in the judgment of Lord Tomlin which reads as follows:

"Every man is entitled if he can so order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be."

In the same appeal, Lord Atkin said:

". . . . it has to be recognised that the subject, whether poor or humble or wealthy or noble, has the legal rights so to dispose of his capital and income as to attract upon himself the least amount of tax."

This, of course, is good law, and it simply means that a taxpayer is entitled to seek avenues of escape from payment of tax by disposing of a part of his income for a lawful purpose. Such was the case in *Inland Revenue Commissioners* v. *Westminister, supra,* where the Duke of Westminister in order to minimise the amount payable by way of surtax disposed of a part of his income to provide an annuity for his employees by a legally enforceable instrument in consideration of past services rendered. Such was also the case in *Russel* v. *Inland Revenue Commissioners* [2] where a taxpayer had disposed of a part of his income to provide annuities for his infant children and the Court of Appeal held that the payments were effective.

I fail to see the parallel between the facts in the cases cited and the case now under appeal as, in those cases the sum disposed of by the taxpayer accrued to the benefit of the employees or children, respectively, whereas the amount of income forgone under the lease in this case was to be held by the subsidiary company for the sole use and benefit of the respondents themselves.

On the question of 'form and substance' we were again referred to the judgment of Lord Tomlin in *Inland Revenue Commissioners* v. *Westminister, supra,* in the course of which he said:

"There may be, of course, cases where documents are not *bona fide* nor intended to be acted upon, but are only used as a cloak to conceal a different transaction. No such case is made out or even suggested here. The deeds of covenant are admittedly *bona fide* and have been given their proper legal operation. They cannot be ignored or treated as operating in some different way because as a result less duty is payable than would have been the case if some other arrangement (called for the purpose of the appellant's argument 'the substance') had been made."

Again in *Inland Revenue Commissioners* v. *Wesleyan Assurance Society,* [3] the following observations of Lord Greene appear at page 751:

"There have been cases in the past where what has been called 'the substance of the transaction' has been thought to enable courts to construe a document in such a way as to attract tax. That doctrine was I hope finally exploded in the decision of the House of Lords in *Inland Revenue Commissioners* v. *Westminister.* The argument of the crown in the present case when really understood, appears to me to be an attempt to resurrect it. The doctrine means no more than that the language that the parties use is not necessarily to be adopted as conclusive proof of what the legal relationship is."

The principle stated above may have been relevant to this case, if the dispute was in regard to the validity of the lease. But that is not the case here. The comptroller admits (*vide* paragraph 13 of Exh. J. at page 299 of the record) that the lease is a legally enforceable document. The issue in this case is not whether the lease is legally enforceable or not but whether the transaction is artificial within the meaning of section 29 of the Ordinance. If the lease is artificial within the meaning of section 29 of the Ordinance it is immaterial whether it is legally enforceable or not. However, it would be pertinent to point out that the so-called agreement embodied in the deed is not in reality an agreement but an arrangement between a principal and a subsidiary which in effect is but an expression of the will of the principal. There can be no question of one party suing the other for a breach of contract since one of them is a wholly owned subsidiary of the other and both of them are under the same control and management. Its practical use is only for accounting purposes.

On the question of the right of a 'tax loss' company to acquire and strip a solvent company of dividend and utilise the profits to absorb tax loss certain authorities were cited: but as the principle involved in all the cases cited is the same, I shall here consider one case only, namely, the case of *Griffiths* v. *Harrison.* [4] In that case the taxpayer company had closed down their business as merchants after incurring losses amounting to £13,585 for the years 1952-53, a sum which was admittedly available to carry forward to 1953-54 for the purpose of tax relief. Subsequently, the taxpayer company altered their memorandum of association to include the business of buying and selling stock and shares and bought the issue capital of a company named Clairborne Ltd. for £16,900, borrowing £15,900 for that purpose. This company later ceased business but had accumulated considerable profit which was available for dividend. The taxpayer

company after receiving the dividend sold all their holding in Clairborne Ltd. for £1,000 and sought to make use of the profit thus gained to absorb tax losses. The tax authorities however refused to allow any deduction to be made on the ground that the purchase and sale of shares in Clairborne Ltd. were carried out solely for the purpose of obtaining fiscal relief and was not a transaction in the nature of an adventure in trade. The House of Lords deciding the appeal in favour of the taxpayer company, held that the transaction was in the nature of an adventure in trade and in the circumstances it was immaterial what the fiscal result or ulterior fiscal object may have been.

The facts in *Griffiths* v. *Harrison, supra,* differ from the facts in the instant case in one important respect. In that case, and indeed in all the cases cited to us, the taxpayer company was the 'tax loss' company which had sought and acquired all the shares in a solvent company in order to strip it of its dividend and to use the profits thus gained to absorb the losses; whereas in the instant case it was a solvent company which bought up all the shares in an insolvent company incurring thereby a small loss of $1,233 on the deal. This can hardly be described as a transaction in the nature of an adventure in trade. From a commercial point of view the transaction by itself was detrimental to the interest of the purchasing company, and in the circumstances it must be assumed that the purpose behind the purchase had nothing to do with normal trade or business.

Admittedly, the acquisition of K.P.M. by the respondents was to take advantage of past trade losses sustained by the former in order to seek tax relief. For myself, I have grave doubts whether K.P.M. is entitled to tax relief after they became a wholly owned subsidiary of the respondents. The respondents did not acquire K.P.M. as a going concern, and assume their liabilities, if any, beside taking over the assets. They acquired all the shares of a company which was defunct in all but name. The position would have been different had K.P.M. taken over S.R. on lease before it became a subsidiary of the respondents, for then the beneficiaries of the tax relief would have been the former shareholders who had borne the brunt of the losses. In such circumstances, the decision in *Griffiths* v. *Harrison, supra,* would have been relevant, but as far as K.P.M. the subsidiary is concerned, these losses are only losses on paper which the present shareholders, namely, the respondents did not sustain.

It is true that the comptroller had in fact assessed the amount to carry forward to 1962 at $124,424, but that computation was made before K.P.M. was acquired by the respondents and on the basis that the old K.P.M. intended to carry on business in 1962.

It is convenient at this stage to consider the implications of section 29(1) of the Ordinance. It reads as follows:

> "29 (1) Where the comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly."

There is no corresponding section in the English Act. Our attention was drawn to section 260 of the Australian Income Tax Act as being relevant for the purpose of construing the provisions of section 29. The Australian section reads as follows:

> "260. *Contracts to evade tax void.* — Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly —
>
> (a) altering the incidence of any income tax;
>
> (b) relieving any person from liability to pay any income tax or make any return;
>
> (c) defeating, evading or avoiding any duty or liability imposed on any person by this Act; or
>
> (d) preventing the operation of this Act in any respect;
>
> be obsolutely void, as against the commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose."

The effect of this section on certain transactions which were a concerted effort to avoid tax was considered by the Privy Council in *Newton* v. *Commissioner of Taxation.*[5] The judgment of their Lordships was read by Lord Denning and the relevant passages appear at pages 467 and 468 of the report. They read as follows:

> "Looking at the whole of this arrangement, their Lordships have no doubt that it was an arrangement which is caught by section 260. The whole of the transactions show that there was concerted action to an end — and that one of the ends sought to be achieved was the avoidance of liability for tax.
>
> This question then arises: What is the effect of section 260 on that arrangement? It is quite clear that nothing is avoided as between the parties but only as against the commissioner. As against him the arrangement is 'absolutely void' so far as it has the purpose or effect of avoiding tax. This is not a very precise use of the words 'absolutely void'. Ordinarily, if a transaction is absolutely void it is void as against all the world. In this case what is meant is that the commissioner is entitled completely to disregard the arrangement — and the ensuing transactions — so far as they have the purpose or effect of avoiding tax. In the words of the courts of Australia, it is an 'annihilating' provision — the commissioner can use the section so as to ignore the transactions which are caught by it. But the ignoring of the transactions — or the annihilation of them — does not itself create a liability to tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into the hands of the taxpayers which the commissioner is entitled to treat as income derived by them. Their Lordships agree with the way in which Fullagar J. put it in his judgment: 'Section 260 alters nothing that was done as between the parties. But, for

the purpose of income tax, it entitles the commissioner to look at the end result and to ignore all the steps which were taken in pursuance of the avoided arrangement.' "

It was argued before us that section 29 of our Ordinance is wider in scope than section 260 of the Australian Act. I cannot accept that. In my opinion our section is more restrictive in scope than the Australian section. Under the Australian Act, the commissioner is empowered to act if in his opinion a particular transaction reduces or would reduce the tax payable whereas under our Ordinance the comptroller must not only be satisfied that the transaction reduces or would reduce the tax payable but must also be satisfied that the transaction was artificial or fictitious.

The meaning of the word 'artificial' in section 29 was interpreted by the Board of Review as meaning, and I quote: "Something which is not natural or normal and out of the ordinary." According to Ali J., and I quote: "The word 'artificial' in section 29 is to be considered as intending to distinguish a transaction which is genuine and that which is not." With respect, I would say that both these definitions are too wide for the purpose of ascertaining the meaning of the word 'artificial' in section 29. Counsel for the respondents argued that an artificial transaction means a sham transaction, that is to say, a transaction which is different from what the written agreement or contract purports to be. If that were so, then the word 'artificial' in section 29 would be rendered redundant. I cannot accept the proposition that the legislature did not mean to distinguish between 'artificial' and 'fictitious' in section 29.

What then could be the meaning of the word 'artificial' in section 29? One of the meanings of the word 'artificial' according to *Oxford Dictionary* is something that is not natural. Now, what is it that could be described as not being natural in relation to a transaction in business or trade? I would say that the sale of goods or other property by a taxpayer at a price far below the market value, unless, of course, he is forced to do so by circumstances beyond his control, would not be a natural transaction in the course of business. In *Petrotim Securities Ltd.* v. *Ayres* [6] which went up before the Court of Appeal, Lord Denning M.R. said:

"It seems to me that, when there is a sale at gross undervalue by one associated company to another, the commissioners are entitled to find that it is not a transaction made in the course of trade. Whoever would suppose that any trader in his right senses would enter into transactions of this kind, that he would sell at a gross undervalue were it not that he had in mind some benefit out of making a loss?"

In my opinion, therefore, any transaction in the course of trade which is not motivated by economic consideration is unnatural and therefore artificial within the meaning of section 29 of the Ordinance. It would follow, therefore, that if a property is leased at a rental far below its market value then the transaction is also artificial.

However, before considering that question in greater detail, I must deal with another point raised by the respondents, namely, that even if the lease was artificial, the comptroller was not justified in assessing the respondents in respect of the income earned by K.P.M. The answer to that question is simple. The income earned by S.R. is deemed to be the income of K.P.M. only by virtue of the lease in question and if the transaction is artificial within the meaning of section 29, the comptroller is entitled to disregard the transaction and assess the income of the respondents on the basis that the lease did not exist.

Now adverting to the question of whether the rental of $1,200 per annum for the lease of S.R. is below the market value or not, the respondents contend that the rental is reasonable when the terms of the lease, other than the rental agreed upon, is taken into consideration. I have read the lease and the conditions attached to it which impose upon the lessees the liability to incur certain expenditure but the expenditure to be incurred is in respect of the normal operational costs of maintaining and running the business of a rubber estate. It will, undoubtedly, be taken into account in computing the assessable income and must have been taken into account when computing the assessable income of S.R. for the year 1962 at $16,145.

It was further contended that in fixing the rental in respect of a lease of rubber land for a period of years, some regard must be had to the probability of a fall in market price of rubber, and the rental must be such as to allow a fair margin of profit to the lessee in the event of such contingency. That may be so, but the price of rubber may also go up and that factor should also be taken into consideration in order to arrive at a realistic figure. The net profit made by S.R. in 1962 was $16,145. To lease an estate with such income potentiality in 1962 at $1,200 per annum, even making allowance for fluctuation in the price of rubber, the rental appears to be grossly low.

That $1,200 per annum is not the economic rental for S.R. appears from an admission made by the secretaries of the respondents in paragraph 11 of a letter (see Exh. A at page 90 of the record) dated 30th January 1964 addressed to the comptroller which reads as follows:

"No doubt the company could have found persons who would be prepared to pay a much higher rental but what condition would the estate be in upon the expiration of the lease?".

This is only an argument against leasing out the estate to persons over whom the respondents could not exercise control and supervision

and not an argument in support of the proposition that the market value of the rental of S.R. in 1962 was $1,200 per annum. On the contrary. it would appear that the market value of the rental was much higher than $1,200.

The respondents had given much thought and time to planning a scheme, which no doubt they honestly believed that they were entitled to put into effect as a legal right, whereby they hoped to obtain substantial reduction of tax in respect of the income derived from S.R. which they were about to acquire. The scheme was as already stated hereinbefore to acquire a 'tax loss' company and lease the estate to it. In such circumstances it would be natural to lease the estate at a low rental so that the tax would fall as lightly as possible on the respondents and at the same time enable K.P.M. to make the greatest possible gain for the respondents by not only paying a small rental on the lease but also by obtaining tax relief under section 33(2)(a) and (b).

Another reason why the lease should be regarded as artificial is, that in the normal course of business or trade, no one would give on lease, a well-managed and good yielding estate unless it is proposed at the expiration of the lease to replant the whole of the estate at once or to change the nature of the crop. But according to the report of the manager at page 282 of the record (Exh. G) it would appear that the recommendation is to replant only about half the area of a 45 acre block in S.R. in 1966 when the lease would be about to expire.

When one considers the nature of the transaction as a whole, beginning with the purchase of the shares of K.P.M. on the verge of liquidation, and incurring a loss of $1,233 on the deal, and ending up with the lease of S.R. at a rental of $1,200 per annum, it appears to be a transaction wholly outside the normal course of trade and therefore artificial. As was said by Pennycuick J. in *Ridges Securities Ltd.* v. *Inland Revenue Commissioners*: [7]

"No doubt where one finds an arm's length purchase and an arm's length sale with a dividend strip interposed, these transactions are to be treated as in the course of the trade of a dealer; but where, as here, the transactions as planned from their inception include a transaction which is not in accordance with the normal usage of the trade — i.e., a sale at much less than the market value — the commissioners are, I think, fully justified in treating the transactions as a whole as not being in the course of trade."

Taking all the facts and circumstances of this case into consideration, I am of the opinion, that the lease of S.R. at a rental of $1,200 per annum is not a transaction in the ordinary course of business and therefore the transaction is artificial within the meaning of section 29 of the Ordinance.

I will therefore allow the appeal with costs to the appellant here as well as in the court below.

Barakbah L.P. and **Ismail Khan J.** concurred.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

NANYANG INSURANCE CO. LTD. v. SALBIAH & ANOR.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and MacIntyre J.) September 5, 1966]

[K.L. — Federal Court Civil Appeal No. X18 of 1966]

Negligence — Claim against insurers — Whether driver of motor vehicle was driving with consent of the insured.

Insurance — Motor insurance — Motor car transferred under agreement for sale — Insurable interest.

This was an appeal against the judgment of the High Court ([1966] 2 M.L.J. 16) under which the appellants as authorized insurers were ordered to pay to the respondents the amount of damages and costs obtained by the respondents against the driver of a motor car. The facts were that the car had been bought by one Lau Teck Siew and it was registered and insured in his name. An agreement was made for the sale of the car to one Abdul Karim and an agreement was entered into with him. This provided for the payment of an instalment of $1,000 but as Abdul Karim was unable to pay this, it was further orally agreed that Abdul Karim should pay this by instalments. It was the intention that the car should be lent to Abdul Karim until he had paid up the instalments and then a hire-purchase agreement would be entered into with a finance company. The accident took place while Abdul Karim was driving the car. On appeal it was argued that Lau Teck Siew had no insurable interest in the car and that Abdul Karim had driven the car with the consent of the insured.

Held: on the facts the appellants had an insurable interest in the car on the date of the accident and the car was being driven by Abdul Karim with the permission of the insured and therefore the finding of the trial judge was correct and the appeal must be dismissed.

FEDERAL COURT.

W. H. Sault for the appellants.

H. E. Cashin for the respondents.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Malacca under which the appellants as authorised insurers were ordered to pay to the respondents a sum of $2,777.55 being a judgment, including costs, obtained by the respondents against one Abdul Karim bin Mohamed Nor alias Hashim bin Mohamed Nor, in reference to the negligent driving of a motor car No. SR. 4805 by the said Abdul Karim.

There were several grounds of appeal, but after objections made by Mr. Cashin for the respondents to the other grounds Mr. Sault proceeded on the following two grounds only:—

"The learned trial judge ought to have held in any event that Lau Teck Siew had no insurable interest in the driving of the insured car No. SR. 4805 by Karim bin